It would be surprising, therefore, if ejectment were restricted to ousters from the surface estate, and it has not been so restricted. From early times up to the present, ejectment has lain for the wrongful occupation of a mine [3] or of the upper story of a house.[4] What difference in principle is there in the case of projecting eaves, walls, bay-windows, and foundation stones?[5] The dispossession of the owner from a part of his land, though small, has been actual and permanent in its nature. The disseisor may not be personally present, but he has subjected the land to a purpose of his own to the exclusion of the owner.[6] The fact that the instrument of occupation does not rest on the soil is of no consequence. The upper stories of a great office building in New York have been built depending for their support on an adjoining building, yet they would seem to constitute an effectual occupation of the premises. There is no greater difficulty in the sheriff delivering possession than in the case of underground encroachments from neighboring land.

It seems hard to escape from the above considerations. The courts that refuse the action rest their decisions mainly on the apparent intangible nature of the invasion, which they regard as effecting not a loss of possession, but merely an injury to its exercise.[7] Some recent Wisconsin cases adopt the view that where the plaintiff has occupied to the line under the projecting eaves he has elected to treat the encroachment as a mere trespass.[8] This reasoning is evidently founded on the notion that an ouster, to be effective, must be from the whole of a vertical plane, including the surface, but the fallacy in thus mistaking a presumption for a necessity has already been shown. New York has vacillated, but the latest case on the question decides that ejectment will lie for a telephone wire strung without right over the plaintiff's premises. *Butler* v. *The Frontier Telephone Company*, 109 N. Y. App. Div. 217. A more extreme case within the principle could scarcely be imagined, but evidently no requisite is lacking. The defendant assumed continuous control of the wire, and used it for his own business purposes. It was not a dead wire abandoned on the premises, and control yielded up. On this distinction a different result might be reached in the case of overhanging branches of trees, for there in many instances the adjoining landowner makes no assumption of possession.[9]

ATTACHMENT OF GOODS FOR WHICH A NEGOTIABLE DOCUMENT OF TITLE IS OUTSTANDING. — At common law the title to goods in the possession of a bailee could not be transferred without attornment.[1] As that rule interfered with the freedom of commerce, bills of lading and warehouse receipts became, by the custom of merchants, representatives of the goods, and their

---

[3] Comyn *v.* Kyneto, Cro. Jac. 150; Moragne *v.* Doe d. Moragne, 39 So. Rep. 161 (Ala.).

[4] Ford *v.* Lerke, Noy 109; Brady *v.* Kreuger, 8 S. Dak. 464.

[5] Sherry *v.* Frecking, 4 Duer (N. Y.) 452; Murphy *v.* Bolger Brothers, 60 Vt. 723. See McCourt *v.* Eckstein, 22 Wis. 153.

[6] *Cf.* Quicksilver Mining Co. *v.* Hicks, 4 Saw. (U. S. C. C.) 688.

[7] Aiken and Ketchum *v.* Benedict, 39 Barb. (N. Y.) 400. See Norwalk Heating and Lighting Co. *v.* Vernam, 75 Conn. 662.

[8] Rasch *v.* Noth, 99 Wis. 285.

[9] See further 14 HARV. L. REV. 291.

[1] Rich *v.* Alfred, 6 Mod. 216.

transfer had the same effect as the delivery of the goods themselves in passing the transferrer's interest.[2] When the custom of merchants was incorporated into the law, the mercantile view of documents of title was not adopted in its entirety. Merchants believed that they should be the sole representatives of the goods, so that no interest in the goods could be gained except through them. The law went the full length in accepting that principle as applied to commercial paper, and in most jurisdictions the maker of a note or the acceptor of a bill of exchange cannot be garnisheed unless the instrument is reached.[3] But in regard to documents of title a half-way position was taken, and though the receipt is a representative of the goods, as was recently held by the Kentucky Supreme Court, the goods also represent themselves, and an attachment of them prevails against a subsequent purchaser of the receipt without notice of the attachment. *Kentucky Refining Co.* v. *Bank of Morilton*, 89 S. W. Rep. 492.[4]

Professor Williston, of the Harvard Law School, at the request of the Commissioners on Uniform State Laws, has prepared a draft of a Sales Act which has been considered by the Commissioners at two national conferences, and which they hope to adopt in its final form this year. One of the most difficult points to be decided is as to what change shall be made in the existing law on this question of transferring property by documents of title. There is a strong sentiment in favor of adopting the extreme mercantile view and forbidding any attachment of the goods. Farmers and planters who store their crops in local warehouses and borrow money at financial centers find lenders unwilling to accept the receipts as security because there may be an attachment on the goods. The strongest objection to the mercantile view is that, by putting the goods beyond the reach of attachment, it is made easy for dishonest bailors to evade their creditors, — an inevitable result if the documents of title are the only representative of the goods.[5]

Efforts have been made to reach a compromise which will make the instruments more negotiable than at present and still leave it possible to attach the goods. It was suggested that the goods be attachable, but that a subsequent *bona fide* purchaser of the receipt should prevail. The objection is that receipts have no date of maturity, and as a purchaser might appear years later with the receipt, it would be unsafe for the bailee to surrender the goods to the attaching creditor. As the act is now drawn, the existing law is unchanged except that a transferee of the document who takes it for value within ten days of its issue prevails over a prior attaching creditor of whom he had no notice. It is purely a compromise measure, and business men feel that it does not go far enough. Business conditions demand that the transfer of title of goods in storage or transit be made as easy as possible, and, as the more freely the documents of title are negotiable, the less opportunity creditors have to attach the goods, the question is, shall the interests of creditors give way before the necessities of the business world? There is still a chance that the answer will be in the affirmative, and that the extreme mercantile view will be accepted, or at least that, in the final draft of the act, the ten-day period will be materially extended.

---

[2] See Benjamin, Sales, 7th ed., §§ 815, 817.
[3] Hutchins *v.* Evans, 13 Vt. 541.
[4] See Roudebush *v.* Hollis, 21 Pa. Co. Ct. 324; Landa *v.* Holck & Company, 129 Mo. 663.
[5] See Collins *v.* Smith, 12 Gray (Mass.) 431.